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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-574

CAROLINA POWER & LIGHT COMPANY
and FLOYD B. McKISSICK ENTERPRISES, INC.,
Petitioners,

v.

ELDRED MOORE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The July 16, 1976, opinion of the Court of Appeals for the Fourth Circuit is reported in 537 F.2d at page 1252. The opinion of the District Court for the Eastern District of North Carolina is not reported in the official reports.

QUESTION PRESENTED

Should the Decision of the Court of Appeals in this Diversity Jurisdiction Common Law Personal Injury Case be Reviewed?

JURISDICTION

Though cases like this one are rarely if ever reviewed by this Court anymore – (it being an ordinary diversity jurisdiction tort case, of no unique significance to anyone but the parties, that involves no provision of the Constitution or any Federal statute, rule or regulation) – under 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the Court of Appeals if it chooses to do so.

STATEMENT OF THE CASE

Upon the trial of plaintiff's action for personal injuries – sustained when he came in contact with an uninsulated electric power line carrying 13,200 volts of electricity – the verdict was that each defendant was negligent, that plaintiff was not contributorily negligent, and that plaintiff was damaged in the amount of $175,000. However, the trial judge entered judgment for the defendants, notwithstanding the verdict, ruling that the plaintiff was contributorily negligent as a matter of law. The Court of Appeals unanimously reversed, holding that, under the evidence, plaintiff's contributory negligence was for the jury to decide rather than the trial judge, and no petition to rehear was submitted by the defendants.

STATEMENT OF FACTS

The uninsulated electrical power line that plaintiff was injured by ran above the roof of a building that he was helping repair, and the negligence of each defendant in regard thereto was plain and incontrovertible. The power company had been running its lethally charged line only 4 feet above the rooftop for several years, in continuous defiance of the mandatory safety standards established by North Carolina law. The premises owner knowingly permitted its roof to be repaired while high-voltage electricity was being carried across and in close proximity to it, and failed to warn plaintiff about it. And his employer required him to work in an inordinately hazardous place, without either attempting to reduce or eliminate the danger and without warning plaintiff about it.

But the evidence as to plaintiff's contributory negligence was insubstantial and inconclusive. Nobody saw the accident, and exactly how plaintiff came in contact with the wire was not shown. Plaintiff recalls nothing that happened immediately preceding his injury and very little of the following two or three weeks, as the charge that he received was almost lethal, 40% of his body being seared with third and fourth degree burns. In addition to the energized wire just 4 feet above the rooftop, a neutral wire that looked exactly like it also ran across the roof just a few inches above the crest. There was no sign or symbol anywhere suggesting that the wires were different or that either wire carried electricity in any voltage. Neither defendant nor anybody else warned plaintiff that either wire was charged – he being absent earlier that morning when several other boys that were about the building were told that the wires were "hot" – and he swore that he did not know either wire was then carrying electricity

in any voltage and that had he known it, he would have refused to work on the roof.

Soul City consisted only of an old plantation house, three or four outbuildings, including the barn that was being converted into a dormitory, and 1,800 acres of vacant land. The project of converting the barn into a dormitory had been underway for some time before plaintiff arrived two days earlier; bricks, blocks, lumber, tin, cement, and other construction materials were in and around the building; the supervisor was an experienced builder; and from aught that appeared to anybody, least of all the inexperienced eye of the plaintiff, the project was proceeding safely and according to plan. Having no knowledge to the contrary, the plaintiff had a right to assume that none of the defendants was neglecting his safety and that the law was being complied with by all of them. *Cox v. Hennis*, 236 N.C. 72, 72 S.E. 2d 25 (1952). Which is to say that plaintiff had the right to assume that the power company was not carrying high voltage electricity in such close proximity to the roof of the building and that the place the premises owner invited him to work and that his employer assigned him to was safe.

Plaintiff went on the roof, not as a trespasser or volunteer, but at the express behest of, and actually accompanied by, his employer-supervisor; and during the five minutes that they were there, his supervisor said and did nothing to indicate that either wire was dangerous. Instead, the supervisor's every act indicated that the wires were harmless, as he worked steadily toward them, nailing down loose portions of tin as he went, and had approached within a few feet of the wires when the accident happened. The tin roof sloped to either side from the center, many pieces of tin all over the roof were loose, and where plaintiff came

in contact with the wires, the tin was not only loose, but several pieces were "blown or folded back" by a wind storm. Specifically what work plaintiff did during the five minutes that he was on the roof before the accident was not testified to by anybody; however, the supervisor did testify that plaintiff was taken to the roof to straighten, secure, remove, and replace the loose and "blown-back" pieces of tin, and that some of the worst places were in the area where plaintiff was injured.

Under both federal and North Carolina law and procedure, contributory negligence is for the defendants to prove and juries to decide except when the evidence is such that reasonable minds can reach only one conclusion about it. And in reversing the trial judge, the Circuit Court unanimously ruled that instead of irresistibly establishing plaintiff's contributory negligence, the evidence raised contrary and conflicting inferences that were beyond the trial judge's power to resolve; that instead of immediately and blindly walking directly into the wires knowing that they were "hot," as the trial judge mistakenly surmised, it could be inferred that plaintiff contacted the wires through no fault of his own; either while attempting to do the work assigned to him, or because of losing his footing on the loose pieces of tin, or, for that matter, because he reasonably believed that the wires were unenergized and harmless.

ARGUMENT

The Decision of the Court of Appeals Should Not Be Reviewed.

Even when viewed in its most favorable light, the petition contains nothing to justify the review of this case. It is but another diversity jurisdiction personal injury case, controlled by its own peculiar facts, that the courts of appeal have been finally evaluating for several decades. And even if the decision below was erroneous, it would still be on the same footing as the many erroneous appeals court decisions that go unreviewed by this Court every term. And, finally, even if the decision did conflict with that of the Second Circuit in *Stoffel v. New York, N. H. & H. R. Company*, 205 F.2d 411 (1953), *certiorari denied*, 346 U.S. 898, 74 Sup. Ct. 222, 98 L.Ed. 399, there would still be no occasion for this Court to choose between them. Because, in *Stoffel*, the court was applying the tort law of New York, whereas, below, the court was applying the tort law of North Carolina, and both courts were following *Erie Railroad Company v. Tompkins*. But, as an analysis of both decisions makes plain, the decision below is neither erroneous nor in conflict with that of the Second Circuit in *Stoffel*.

Negligence cases, even more than others, are governed by their own facts, and the trial court erroneously rendered judgment for the defendants simply because he misperceived the facts of the plaintiff's case. Plaintiff's right to assume that his employer was furnishing him a safe place to work, and that his supervisor was not rashly exposing both of them to death and disaster, was completely overlooked, and it was mistakenly deduced that plaintiff deliberately walked into the wires immediately upon reaching the roof, instead of coming in contact with them after

he had been working there for about five minutes in the company of his supervisor. But when these oversights and misconceptions were rectified by the court of appeals, the decision reached was not merely sound, it was inevitable. That careful people can and do lose their footing on sloping, loose tin roofs is known to everybody; and that young, inexperienced employees, completely new to the job, without knowledge that it involves undue danger, are not negligent *per se* for following their employer's example and instructions is too obvious for discussion. And, instead of discussing either of these unassailable conclusions, the petitioners implicitly and fallaciously argue that employees, rather than employers, have the superior duty to determine the safety of the place that they are assigned to work, and that it is negligence *per se* to even work at all in close proximity to power lines. And in doing so, they cite or quote from 16 decisions, the irrelevancy of which to this case is astonishing. Because

– 2 of the cases involved pedestrians ON THEIR OWN INITIATIVE walking heedlessly into the paths of SPEEDING AUTOMOBILES;

– 2 cases involved people ON THEIR OWN INITIATIVE approaching fallen power lines that were then sizzling and emitting sparks, when people nearby were screaming about the danger;

– 5 cases involved experienced sign painters, feed distributors, and the like, who knew that the wires above them carried high voltage electricity ON THEIR OWN INITIATIVE extending aluminum ladders, blower pipes, and other devices 30 feet or more above them;

– 2 cases involved householders on their own premises, who knew high-voltage wires were above them, ON THEIR

OWN INITIATIVE pushing pipes and television aerials 30 feet or more above them;

– 1 case involved a householder on his own premises, ON HIS OWN INITIATIVE cutting a tree 50 feet high so that it fell across wires that he had known about for years;

– 2 cases involved experienced crane operators ON THEIR OWN INITIATIVE maneuvering booms that were 70 feet long into high-voltage wires that they both knew and had been warned about;

– 1 case involved a trespassing youth who ON HIS OWN INITIATIVE surreptitiously climbed to the roof and admittedly ran into wires that were a few feet above the building.

Nor does the 16th court decision cited by the petitioners – *Stoffel v. New York, N. H. & H. R. Company, supra* – have any bearing on the decision below, and, certainly, it does not conflict with it. Instead of being inexperienced and acting under the immediate guidance and direction of his supervisor, Stoffel was an experienced employee who went to the railway yards in Brooklyn by himself to unload a freight car. When the car was eventually found, it was under a high-voltage wire that ran just a few feet above the top of the car and the employee came in contact with the wire while standing on top of the car unloading it. Which prompted the court to properly conclude that the employee knew more about the situation than his employer did, who was five miles away, and that in that setting he could not assume, merely because his employer sent him there, that the particular car involved was in a safe place, as the freight yards covered many square miles and the employer only knew that the car was somewhere in the

vast area. Whereas, here, the employer was present, personally, selected the place to work, and not only said nothing about the wires being energized, but gave every indication by his conduct, by steadily working toward them, that they were harmless. Furthermore, why Stoffel came in contact with the wires was no mystery. He did so by standing on top of the car and swinging a car unloading tool above him; whereas, here, as the court pointed out, the plaintiff might have contacted the wires involuntarily, through no fault of his own, in several different ways.

CONCLUSION

The petition for certiorari is without merit and should be denied.

Respectfully submitted,

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